

Comments on S4 (Compliance with Standards) and S2 (Authorized Discharges)

OVERVIEW

This attachment contains detailed discussion points and recommendations regarding Ecology's Public Review Draft Phase I Municipal Stormwater NPDES Permit (February 15, 2006) on Special Condition S4 (Compliance with Standards) and S2 (Authorized Discharges). Seattle's recommendations provide a more clear linkage among requirements contained in Special Condition S4 (Compliance with Standards), Special Condition S2 (Authorized Discharges), and Special Condition S5 (Stormwater Management Program).

Seattle's recommendations for S2 and S4 are based on the following five principles:

1. Every requirement placed on a Permittee must be based on actions or conditions that are within existing legal authority of the Permittee and for which the Permittee can reasonably be held accountable.
2. Compliance with the Permit constitutes meeting the requirement to reduce pollutants in municipal stormwater discharges to the Maximum Extent Practicable (MEP) per the federal Clean Water Act.
3. The standards contained in Ecology's *Stormwater Management Manual for Western Washington (2005)* represent the application of all known, available, and reasonable technologies (AKART) as defined in RCW 90.48.
4. Compliance with the permit will be presumed to constitute compliance with existing regulatory requirements for stormwater.
5. If site-specific information demonstrates that a water quality problem is occurring in a receiving water body owing to a discharge from a Permittee's MS3, then a clearly defined set of actions, review, and approval processes to address the problem, involving both the Permittee and Ecology, is to be provided in the Permit.

Seattle's comments are presented on the following pages in three sections:

- Part I: Seattle's Recommendation for S4. Compliance with Standards
- Part II: Seattle's Recommendation for S2. Authorized Discharges
- Part III: Alternative (Less Preferred) to Seattle's Recommendation for S2. Authorized Discharges

PART I:

SEATTLE'S RECOMMENDATION FOR S4. COMPLIANCE WITH STANDARDS

1. Overview of Seattle's Recommendation for S4. Compliance with Standards:

Seattle is providing a recommendation for S4 to address the issue of compliance with standards in this municipal stormwater NPDES permit. This alternative will satisfy the five basic principles expressed at the beginning of this attachment while, at the same time, avoiding the regulatory and programmatic difficulties that are currently presented in the preliminary draft permit.

2. Seattle's Recommendation for S4. Compliance with Standards:

S4. COMPLIANCE WITH STANDARDS - SEATTLE REPLACEMENT LANGUAGE

- ~~A.~~ In accordance with RCW 90.48.520, the discharge of toxicants to waters of the state of Washington which would violate any *water quality standard*, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited.
- ~~B.~~ This permit does not authorize a violation of Washington State surface water quality standards (Chapter 173-201A WAC), ground water quality standards (Chapter 173-200 WAC), sediment management standards (chapter 173-204 WAC), or human health based criteria in the national Toxics Rule (Federal Register, Vol. 57, NO. 246, Dec. 22, 1992, pages 60848-60923).
- ~~C.~~ A. The Permittee shall reduce the discharge of pollutants to the *maximum extent practicable* (MEP) by following the terms of this permit.
- ~~D.~~ B. The Permittee shall use *all known, available, and reasonable methods of prevention, control and treatment* (AKART) to prevent and control pollution of waters of the state of Washington by following the terms of this permit.
- ~~E.~~ C. In order to meet the goals of the Clean Water Act, to demonstrate compliance with S4.A and S4.B, and ~~make progress toward compliance with~~ to sufficiently address the long-term goal of meeting applicable surface water, ground water and sediment management standards in the receiving water to the maximum extent practicable, each Permittee shall comply with the requirements of this permit, including section S4.D. Compliance with the terms of this permit shall fully satisfy this requirement and constitutes compliance with all existing statutory and regulatory requirements for municipal stormwater discharges.
- D. If a water quality problem is discovered, the permittee shall meet its permit obligations fully by doing the following: The actions listed below will be taken when the Permittee and Ecology determine, based on well-documented site-specific information, that a significant water quality problem in the receiving water caused by an MS3 owned or operated by the Permittee can be improved by implementing additional programmatic measures beyond those required in Special Condition S5 and S7.
 - 1. The Permittee shall submit a report to Ecology within 60 days after a determination by the Permittee and Ecology. The report shall include:

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- i. A summary of technology-based BMPs and programmatic activities currently being implemented that are affecting the discharge from the Permittee's MS3.
 - ii. A proposed implementation schedule for additional programmatic activities that will be implemented.
2. Ecology shall review the report and, in writing within 30 days after receipt, shall approve the additional programmatic activities and the Permittee's implementation schedule or require the Permittee to modify its report.
 3. The Permittee shall submit a modified report to Ecology within 30 days after receiving notification to modify.
 4. Within 30 days after receiving written approval by Ecology of the report described above, the Permittee shall revise its SWMP and implement additional programmatic activities in accordance with the approved schedule.
 5. The Permittee shall include in its Annual Report an update on its revised SWMP.
 6. So long as the Permittee has complied with the procedures set forth above and is implementing its revised SWMP according to the approved implementation schedule, the Permittee does not have to repeat the same procedures for the water quality problem unless directed otherwise by Ecology.
- ~~F. Ecology may modify or revoke and reissue this general permit in accordance with General Condition G14. GENERAL PERMIT MODIFICATION AND REVOCATION, if Ecology becomes aware of additional control measures, management practices or the actions beyond what is required in this permit, that are necessary to:~~
- ~~1. Reduce the discharge of pollutants to the MEP;~~
 - ~~2. Comply with the state AKART requirements; or~~
 - ~~3. Control the discharge of toxicants to waters of the state of Washington.~~

3. Discussion of Seattle's Recommendation for S4. Compliance with Standards:

In the replacement language above, including new paragraph D, Seattle's recommendation is consistent with the federal Clean Water Act, the concept of "maximum extent practicable," EPA's guidance for MS4s, the ruling of the Ninth Circuit Court of Appeals, and Ecology's 2004 Report to the Legislature regarding its intentions for NPDES stormwater permits. Seattle's recommendation also appropriately links complying with the terms of this permit with complying with all legal requirements for MS4s. Seattle's recommendation confirms, in a straightforward manner, that Ecology has accomplished its task of permit issuance and confirms the actions that are required of Permittees.

Seattle is committed to continual improvement in its stormwater management program. Seattle is committed to a long-term goal of achieving water quality standards in the receiving waters in and around Seattle. That is why Seattle suggests a new paragraph "D" set forth above. The proposed new section will create an iterative process of targeted responses by a Permittee in partnership with Ecology that will effectively address specific water quality problems that Ecology and the Permittee have identified. This is in addition to the SWMP and all other permit

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requirements. New paragraph D clearly describes the process that Permittee and Ecology must follow whenever additional, site-specific measures are required. It defines responsibilities, includes Ecology in the approval process, and will provide a record of actions taken. New paragraph D therefore implements the regulatory principle that when a water quality problem is documented in stormwater, BMPs are the primary means of control and the discharger shall apply further water pollution control measures that Ecology approves.

Significantly, new paragraph D also reflects current practices. Local jurisdictions often ramp up selected programmatic activities in coordination with state regulators in response to site-specific information that indicates additional measures are required to protect water quality. Consider, for example, Seattle's ongoing efforts to reduce pollutants in stormwater discharges into the Lower Duwamish River, efforts that are being conducted in close collaboration with Ecology and EPA.

Because new paragraph D is very specific, it should not be necessary to modify the permit to implement the terms. However, a permit modification can be used if needed. Seattle is aware of Ecology's limited resources to review site-specific requirements. Seattle is willing to work with Ecology and other authorities as necessary to explore opportunities to secure funding for the site-specific review that would be required to make this iterative process most effective.

If changes are not made to S4 of the public review draft permit, then Ecology presents Permittees and the public with a condition that is unsupportable in a municipal stormwater permit. It does not convey to Permittees how to comply, or at what point, or with what actions. Therefore, it undermines all the other permit terms and programmatic commitments of all Permittees, Phase I and Phase II. S4.A is illegally vague, overbroad, and not reasonably certain. It fails to give Permittees adequate notice of what is necessary to comply. RCW 90.48.520 is not controlling and should not be cited; it applies only to "wastewater" and not to municipal stormwater, as King County explains in its comments. The Fact Sheet even confirms Ecology's findings that the word "toxicant" is not defined in Chapter 90.48 RCW. Ecology has not taken the opportunity to promulgate regulations specific to municipal stormwater permits. Water quality regulations confirm that for stormwater, BMPs are to be used to control pollutants. If Ecology intended to create a water quality compliance provision, it has not followed law and regulations, including but not limited to omitting any site-specific discharge considerations and possible dilution. Public review draft S4.B is also illegally vague, overbroad, uncertain, and provides inadequate notice. Its approach would be to not authorize an ill-defined category of discharges. This same flaw is in S2. Overall, these conditions are inconsistent with Ecology's task of creating a permit that places defined and appropriate controls on municipal stormwater and makes Permittees accountable for progress using those controls. S4.A and S4.B do not represent MEP and therefore go beyond that which is required by the Clean Water Act for all provisions of an MS4 permit.

Public review draft S.4F is deleted, because it is beyond Ecology's authority. G14 provides ample grounds for reopening.

PART II

SEATTLE'S RECOMMENDATION FOR S2. AUTHORIZED DISCHARGES

1. Overview of Seattle's Recommendation for S2. Authorized Discharges:

Seattle's recommendation is based on the exercise of municipal authority and MEP in a manner that will satisfy the five basic principles expressed at the beginning of this attachment. Seattle believes that the permit should clearly authorize the discharges that will, in fact, occur. The permit, in Seattle's view, should address pollutant concerns with effective prohibition and a strong BMP program.

2. Seattle's Recommendation for S2. Authorized Discharges:

[Delete Draft S2.A, B, C & D and replace with the following.]

S2. AUTHORIZED DISCHARGES - SEATTLE REPLACEMENT LANGUAGE

- A. This permit authorizes the discharge of stormwater to surface waters and to ground *waters of the state* from municipal separate storm sewers owned or operated by each Permittee covered under this permit in all geographic areas covered by this permit pursuant to S1.A. Authorization covers all new and existing discharges from existing municipal separate storm sewers, and discharges from municipal separate storm sewers constructed after the effective date of this permit that have received all applicable state and local permits, including compliance with Ch. 43.21C RCW (the State Environmental Policy Act).
- B. Discharges to ground waters of the state through facilities regulated under the Underground Injection Control (UIC) program, Chapter 173-218 WAC, are not covered under this permit. Discharges to ground waters of the state not subject to regulation under the federal Clean Water Act are covered in this permit only under state authorities, Chapter 90.48 RCW, the Water Pollution Control Act.
- C. Discharges from municipal separate storm sewers owned or operated by a Permittee that are composed of non-stormwater or stormwater associated with industrial and construction activity are authorized when the Permittee generally complies with Special Condition S5.C.8 (Illicit Connection and Illicit Discharges Detection and Elimination) to prohibit non-stormwater discharges into MS3s owned or operated by the Permittee, to the extent and in the manner required by S5.C.8.
- D. This permit authorizes discharges from emergency and non-emergency fire fighting activities. This permit authorizes discharges from flow that is authorized by a separate NPDES permit.

3. Discussion of Seattle's Recommendation for S2. Authorized Discharges:

Seattle's recommendation is to delete S2.A, B, C & D and insert the draft above. Seattle's recommendation is based on the proper exercise of municipal authority and on the concept of Maximum Extent *Practicable* (MEP). Seattle believes that the best approach is to clearly authorize the discharges that will, in fact, occur and to address pollutant concerns with effective prohibitions and a strong BMP-based program. The public review draft version, in contrast, can

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be read as denying permit coverage (authorization) to certain municipal urban stormwater discharges. The public review draft can be read to require that a municipal Permittee guarantee the NPDES permitting of, or eliminating of flows from, a process or a property over which a Permittee may have no control. Compliance with this condition can be read as contingent on other entities (in this case, Ecology, which has responsibility for the NPDES program, and every public and private site that has a requirement to obtain an NPDES permit), such that others must meet their regulatory obligations in order for a Permittee to meet its regulatory obligations. This places an unfair and improper burden on a Permittee.

A Permittee cannot guarantee that others will not illegally discharge into its MS3. The maximum extent practicable in this case is that a Permittee can regulate others, communicate with Ecology when it learns of a need for NPDES permits, and comply with a program as in S5.C.8 (Illicit Connections & Illicit Discharges). Seattle's proposal reflects this concept of MEP. Seattle's preferred alternative: (1) requires effective prohibition of non-stormwater discharges, and (2) more clearly identifies the categories of non-stormwater discharges that are to be addressed by Permittees and Ecology and how these discharges are to be addressed, which is consistent with the illicit discharge program required by the permit. The word "generally" is inserted to avoid the unrealistic interpretation that the Permittee must have, in fact, discovered and initiated enforcement against every potential violator.

PART III:
ALTERNATIVE (LESS PREFERRED) TO SEATTLE'S RECOMMENDATION FOR
S2. AUTHORIZED DISCHARGES

1. Overview:

An alternative to the recommendations presented in Part II for S2 (Authorized Discharges), which modifies rather than replaces the language in the public review draft permit, is provided below.

2. Alternative (Less Preferred) to Seattle Recommendation for S2. Authorized Discharges
(Revisions by paragraph rather than complete replacement.)

S2. AUTHORIZED DISCHARGES - ALTERNATIVE TO PREFERRED OPTION

A. This permit authorizes the discharge of stormwater to surface waters and to ground *waters of the state* from municipal separate storm sewers owned or operated by each Permittee covered under this permit in ~~the~~ all geographic areas covered by this permit pursuant to S1.A, subject to the following limitations:

- ~~1. All discharges into and from municipal separate storm sewers owned and operated by Permittees must be in compliance with this permit.~~

(Seattle does not have additional comments on S2.A.2 – S2.A.4.)

B. This permit authorizes discharges of *stormwater associated with industrial and construction activity* and *process wastewater* discharges from municipal separate storm sewers owned or operated by the Permittee to waters of the state under the following conditions:

1. Stormwater associated with construction or industrial activity, as defined by 40 CFR 122.26, discharging into a Permittee's MS3, must be authorized by a separate individual or general *National Pollutant Discharge Elimination System* (NPDES) permit issued by Ecology, or the Permittee must be generally in compliance with the requirement to prohibit such discharges, to the extent and in the manner required by Special Condition S5.C.8 Illicit Connections and Illicit Discharges Detection and Elimination; or
2. Process wastewater discharging into a Permittee's MS3 must be authorized by another NPDES permit issued by Ecology, or the Permittee must be generally in compliance with the requirement to prohibit such discharges, to the extent and in the manner required by Special Condition S5.C.8 Illicit Connections and Illicit Discharges Detection and Elimination.

C. This permit authorizes discharges from emergency and non-emergency fire fighting activities ~~unless the discharges are identified as significant sources of pollutants to waters of the State.~~ Where applicable and when not interfering with health and safety issues, BMPs for non-emergency fire fighting flows are encouraged.

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- D. This permit does not authorize any other illicit or non-stormwater discharges except as provided in when Permittee complies generally with the requirement to prohibit such discharges, to the extent and in the manner required by Special Condition S5.C.8 or S6., nor does it relieve entities responsible for illicit discharges, including spills of oil or hazardous substances, from responsibilities and liabilities under state and federal laws and regulations pertaining to those discharges.

3. Discussion of Seattle's Alternative (Less Preferred) to Seattle's Recommendation for S2. Authorized Discharges:

Seattle's alternative (less preferred) to our recommendation presented in Part II of this Attachment above is based on the exercise of municipal authority rather than (as in the public review draft permit) unreasonable guarantee. S2.A.1, new to the public review draft, is not required to ensure the CWA's requirement to reduce pollutants to the Maximum Extent Practicable (MEP); it far exceeds MEP and can be read to attempt to make the Permittee guarantee the compliance of others, including any other municipal Permittee that discharges upstream into the MS4. The language does not recognize that MS4 Permittees have limited authority over discharges to the MS3 and from the MS3. Permittees do not own and control the inputs, as with a process water permit. Because of this, Congress created the "maximum extent practicable" standard, which sets municipal stormwater apart from all other NPDES-regulated discharges. Ecology's proposed language is vague, overbroad, not reasonably certain, and fails to give Permittees adequate notice of what is necessary to comply. The other requirements of the permit will stand on their own to require action. A better alternative for S2 would be to return to the baseline "authorized discharges" language of the 1995 NPDES Municipal Stormwater Permit, which has proved adequate for the past 10 years.

In S2.B, the original wording in the public review draft permit appears to be based on an NPDES model for a private site, where the single permittee has actual control of discharges from its own property or process. This is not the case with municipal stormwater, which receives flows into its MS3 from properties owned by others. A municipal permittee can regulate others and implement well-designed programs. However, a permittee cannot guarantee that others are not illegally discharging into its MS3. It is not a practicable solution, therefore, to simply not authorize discharges from the MS3 even when the municipal permittee has complied with its MEP permit. The proposed redraft above (1) better identifies the discharges, and (2) links a Permittee's compliance with this section with compliance with the associated SWMP component of Special Condition S5.C.8, rather than solely on reliance on Ecology-issued NPDES permits. The word "generally" is inserted to avoid the unrealistic interpretation that the Permittee must have in fact discovered and initiated enforcement against every potential violator.

In S2.C, Seattle alternative is based on the federal CWA's definition for an illicit discharge, which specifically excludes "fire fighting activities," which in Seattle's view should include both emergency and training activities. In contrast, the public review draft permit authorizes discharges from emergency fire fighting activities provided such discharges have not been identified as significant sources of pollutants to waters of the state, but does not authorize other discharges associated with fire fighting training. This is unrealistic and may even place the

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public in danger. Fire fighting, preparatory training exercises, and equipment testing, all of which occur at various locations and are a vital public functions, cannot stop upon the effective date of the permit. BMPs for non-emergency flows should be encouraged. If flows are deemed a “significant source of pollutants,” then the permit should require that fire departments develop and follow best management practices for the non-emergency discharges, instead of Ecology’s proposed approach.

In S2.D, the minor revision above more clearly links a Permittee’s compliance with this section with compliance with the associated SWMP component of Special Condition S5.C.8. The word “generally” is inserted to avoid the unrealistic interpretation that the Permittee must have in fact discovered and initiated enforcement against every potential violator.